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No. 71-147

In the Supreme Court of the United States

OCTOBER TERM, 1971

DICK RHEINGANS, PETITIONER

v.

JOHN MITCHELL, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, a Selective Service registrant, instituted the present action to compel his Local Board to set aside an order directing him to report for civilian work in lieu of induction. He alleged that the board had acted unlawfully in failing to reopen his I-O conscientious objector classification and in failing to grant him a III-A hardship classification. The District Court in 1968 reviewed petitioner's record before the draft board, found that it established a prima facie case for re-opening and enjoined the board from ordering the petitioner to appear for civilian work until the board had reopened the case and considered petitioner's request for reclassification (Pet. App. I

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viii). On February 3, 1969, the district court, after the decision of *Clark* v. *Gabriel*, 393 U.S. 256, and relying on Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3),[1] vacated its prior decision and dismissed the action. The Court of Appeals for the Ninth Circuit affirmed *per curiam*. As we show below, the Ninth Circuit decision is correct and there is no conflict among the Circuits. Accordingly, further review by this Court is not warranted.

The rulings by both courts below are correct. Petitioner contends that *Clark* v. *Gabriel* is inapplicable to his case and that preinduction (or pre-civilian-work) review should have been permitted under *Oestereich* v. *Selective Service Board* 393 U.S. 233, because here the conduct of the local board was "basically lawless" (393 U.S. at 237). However, unlike *Oestereich*, petitioner here was not denied either

[1] Section 10(b)(3) (50 U.S.C. (Supp. V) 460(b)(3) pertinently provides that:

"* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title * * *, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * *"

While the 1967 Act terminated on July 1, 1971 (50 U.S.C. (Supp. V) App. 467(c)), we anticipate that Congress will renew that legislation before this Court acts on the present petition for certiorari in October.

an exemption or a deferment to which he was indisputably entitled under the Act. Instead, the hardship classification sought here, like the conscientious objector classification sought in *Clark* v. *Gabriel,* was within his local board's authority to grant or deny (see 50 U.S.C. App. (Supp. V) 456(h)(1); 32 C.F.R. 1622.30(b)) and "inescapably involve[d] a determination of fact and an exercise of judgment." (393 U.S. at 258.) Moreover, the issue as to whether petitioner had a *prima facie* case for reopening is not "purely a question of law" (Pet. p. 16). What constitutes a *prima facie* showing sufficient to warrant a reopening of an outstanding classification is necessarily a mixed question of law and fact. Indeed in passing on a claim for reopening, the Board, as shown in *Mulloy* v. *United States,* 398 U.S. 410, 418, note 7, must undertake the following, essentially factual inquiries:

> (1) Is the claim "plainly incredible"?
> (2) Even if true, do the new facts alleged in the claim, warrant the reclassification sought?
> (3) Has the claim already been passed upon?
> (4) Is the claim refuted by other information in the registrant's file?

Of course, to determine these issues, the court would be required to open and examine the registrant's Selective Service file and judge the factual issues before the board as the district court initially did here. Such an examination provides "the kind of 'litigious interruptions of procedures to provide necessary military manpower' * * * which Congress sought to prevent when it enacted § 10(b)(3)." *Clark* v. *Gabriel, supra* at 258–259; see *Sloan* v. *Local Board No. 1.*

414 F. 2d 125, 128 (C.A. 10); *Ferrell* v. *Selective Service Local Board*, 434 F. 2d 686, 688 (C.A. 2).

There is no conflict in the decisions. To the contrary, all courts passing directly on the problem have ruled, as did the court below, that a Board's allegedly improper refusal to reopen when the issue to be decided requires a factual determination is insufficient to permit judicial intervention prior to induction. *Lane* v. *Local Board No. 17*, 3 S.S. L.R. 3759 (C.A. 1); *Ferrell* v. *Selective Service Board*, *supra* 434 F. 2d 686 (C.A. 3); *Edwards* v. *Selective Service Local Board No. 111*, 432 F. 2d 287 (C.A. 5), certiorari denied, 402 U.S. 952.[2]

Petitioner will have the opportunity to have the Board's refusal to reopen reviewed by the district court after he has reported for civilian work or refused to do so. *Mulloy* v. *United States* (*supra*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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[2] *Fein* v. *Selective Service System Local Board No. 7*, 430 F. 2d 376, certiorari granted, 401 U.S. 953, presents an unrelated issue involving a constitutional challenge to the taking, by a State Selective Service Director, of an appeal from a Local Board determination in favor of the registrant. There is, of course, no such issue in the present case.

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